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No. _____

In The
Supreme Court of the United States

HALEY KING,

Petitioner,

v.

CONROE INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Fifth Circuit's opinion in this case increase the standard set forth in *Gebser*, and used in Title IX cases to determine notice and conscionable indifference, to such a degree as to render such standard meaningless?

2. Is it erroneous for a Title IX Plaintiff to be required to prove personal knowledge of a supervisory official to show that same official had actual notice, as required under *Gebser*, to impose liability on a school district in a Title IX case?

3. Is it consciously indifferent for a school principal, who has personally received a report of an eye witness account that a teacher and student, whose identity can be easily determined, are kissing, passing notes, and having an affair, to do nothing more than to, at most, ask the harassing teacher if she is having an inappropriate relationship with a student, and then to take that teacher's word when she says no, when the abuse continued and so many other clearly appropriate responses were admittedly available to stop the abuse?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Haley King

Defendant-Appellees and Respondents: Conroe Independent School District; and Don Stockton

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PETITION FOR A WRIT OF CERTIORARI

Haley King ("King") respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit, dated May 29, 2007, is unpublished, however, it is reproduced at App. A 3a-10a.

The opinions of the U.S. District Court for the Southern District of Texas, Houston Division, dated September 8, 2004, and July 15, 2005, became final and appealable judgments by order and final judgment, dated October 18, 2005. The U.S. District Court for the Southern District of Texas, Houston Division's September 8, 2004 memorandum and opinion is unpublished, however it is reproduced at App. F, 40a-84a. The U.S. District Court for the Southern District of Texas, Houston Division's July 15, 2005 memorandum and opinion is unpublished, however it is reproduced at App. E, 15a-39a. The U.S. District Court for the Southern District of Texas, Houston Division's October 18, 2005 order and final judgment is unpublished, however it is reproduced at App. D, 13a-14a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit sought to be reviewed was entered on May 29, 2007. Petitioner filed a Motion for Rehearing, along with a Motion to File Out of Time Petition for

Panel Rehearing, and Memorandum thereon, on June 21, 2007. By Order dated July 18, 2007, the U.S. Court of Appeals for the Fifth Circuit granted Haley King's Motion for Leave to File Petition for Rehearing Out of Time but denied Haley King's Petition for Rehearing. This petition is timely under 28 U.S.C. § 2101(c), and Supreme Court Rule 13.1 because it is being filed within 90 days of entry of the U.S. Court of Appeals for the Fifth Circuit's order on Haley King's Motion for Rehearing. The Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 20 U.S.C. § 1681 and 42 U.S.C. § 1983. The relevant statutory provisions are reproduced at App. G, 85a-90a.

STATEMENT OF THE CASE

This action arises from a Conroe Independent's School District, ("CISD"), teacher's sexual molestation of a CISD student, which molestation was known by a CISD principal, as well as other CISD employees, but, nevertheless, was allowed to continue, unabated to the harm and detriment of the student, Haley King.

The issues in this Petition arise from the trial court and, subsequently, the Fifth Circuit's reliance on misinterpretations of a rule of law pronounced by this Court, with regard to the application of a statute, in granting the motions for summary judgment filed by Don Stockton, the principal who knew of the abuse but

essentially did nothing to prevent the continuation of the same, and CISD, thereby making a molested student's success in a civil lawsuit, virtually impossible, and rendering this Court's rules of law on the issue, meaningless.

Procedural History

On or about April 21, 2003, Haley King, Plaintiff in the underlying complaint case, Appellant in the Fifth Circuit Court of Appeals, and Petitioner herein, filed claims against her former volleyball coach, Felicia Shupp, her former principal, Don Stockton, ("Stockton"), and CISD because Felicia Shupp, sexually abused her over a three to four year period of time, the entirety of which, Haley attended schools in CISD. Haley's claims were brought under 42 U.S.C. § 1983 and 20 U.S.C. § 1681. On or about June 23, 2003, Don Stockton filed a motion to dismiss the claims brought against him under Title IX and 42 U.S.C. § 1983, to which Haley King responded, but which motion to dismiss was ultimately granted by the trial court on September 3, 2003. Shortly thereafter, the Petitioner filed a first and second amended complaint. Subsequently, on or about January 20, 2004, Don Stockton filed a motion for summary judgment with regard to Haley's 42 U.S.C. § 1983 claim against Don Stockton, which motion was granted by the trial court on September 8, 2004. Based on the trial court's dismissal of Haley's claims against Don Stockton, on or about October 28, 2004, CISD moved for summary judgment, to which Petitioner responded substantively and with a motion for extension of time. By memorandum and order dated July 15, 2005, the trial court granted CISD's motion for summary

judgment and denied Petitioner's motion for an extension of time. On October 18, 2005, the trial court entered a final judgment as to the Petitioner's claims against CISD and Don Stockton, severing the Petitioner's claims against them from Petitioner's claims against Felicia Shupp.

Haley King petitions this Court for review of the Fifth Circuit's decision holding that, as a matter of law, while "ineffective, and perhaps negligent," that it is not deliberately indifferent for a principal who has received a report that one of his students is being molested by a teacher at his school, and who knows the molesting teacher's identity, as well as information regarding the child's identity, to do nothing more, at best, than ask the abusive teacher if she is having an inappropriate relationship with a student, take the teacher's word when she answers no, and conduct no further investigation into the matter.

Factual Background

In or about August of 1997, Petitioner Haley King, (hereinafter "Haley"), a 13 year old girl, attended 8th grade at McCullough Junior High School in The Woodlands, Texas, where she played volleyball on the school's team, which was coached by Felicia Shupp, (hereinafter "Shupp"), who was hired by Don Stockton, the school's principal. Haley admired Shupp and looked up to her as a role model. As time progressed, King spent increasingly more time with Shupp. In the fall of 1997, Haley spent a few weekends with Shupp and her husband while her parents were out of town. In subtle fashion, it was then that the inappropriate acts by Shupp began. Shupp started by watching

Haley sleep. Then one night, the uninvited Shupp slipped into bed with Haley, and stayed there for hours. Shupp showered Haley with attention, gifts, and passed increasingly more intimate notes to her. In August of 1998, while at King's parents' home, Shupp kissed Haley.

In the Fall of 1998, Haley was in 9th grade at McCullough Junior High School, but was playing for varsity volleyball team at The Woodlands High School. Each day, after classes at McCullough, Haley rode a bus to The Woodlands High School campus to play volleyball. On game days, it was common practice for the 9th grade volleyball teams from McCullough, and the junior varsity and varsity volleyball teams from The Woodlands High School, to travel together by bus to other schools in the CISD. During these bus rides, Haley and Shupp were both on the bus, and Haley was under Shupp's supervision. During varsity games, Shupp sat on the bench and acted as an assistant coach, during which times Haley was under her supervision. During the same Fall, Shupp kissed Haley in the locker room at McCullough Junior High School, and one day while watching a movie at Haley's parents' house with Haley, Shupp put her hand in Haley's shorts and began touching her inappropriately.

By this point, the relationship between Haley and Shupp had been noticed. Both D. Jane Allen, a teacher at McCullough Junior High whose classroom was located across the hall from Shupp's, and Gale Drummond, the assistant principal at McCullough, told police that they had conversations with Felicia Shupp about teacher/student relations in or about the Fall of 1998, this same school semester. Also, during

that same Fall semester, Ruth Stayton, a parent of a child attending McCullough Junior High, heard a conversation between her son and his girlfriend about a female student at school and a female girls' volleyball coach at the school having an affair. Mrs. Stayton's son's girlfriend said she knew the student on girls' volleyball team, and that she had seen the coach and team member passing notes and kissing. Disturbed by what she heard, Mrs. Stayton went to the school's office to report what she had heard to Stockton. When Mrs. Stayton arrived at the office, she was told Stockton could be found in the lunch room, so she went to the school's lunch room to find Stockton, and upon finding him, she reported to him that her son's girlfriend witnessed a female student and female volleyball coach kissing, passing notes, and having an affair. Although at the time, Mrs. Stayton did not know the name of the coach, when she told Stockton about the affair, he remarked, *Coach Shupp*. Stockton said that he would bring her (Shupp) into the office and talk to her. He told Mrs. Stayton that he did not think the information she had told him was true, that the student's probably misconstrued the situation, and that he knew the Shupp's family. Regardless, Mrs. Stayton had no doubt that Stockton understood what she was telling him and which of the volleyball coaches was being reported.

Suspiciously, while there is some testimony, albeit disputed by conflicting evidence, that Stockton called Shupp into his office at some point after Mrs. Stayton reported Shupp's affair with Haley, during which he asked Shupp if she was having an inappropriate relationship with a student, no such meeting is documented. Shupp's personnel file does not include

any documentation evidencing Mrs. Stayton's report or that Shupp was confronted with the allegation of her involvement in an affair with a student by Stockton, Drummond, or anyone else for that matter. Likewise, Shupp's police statement does not mention that any meeting took place between Shupp and Stockton for the purpose of addressing the report made by Mrs. Stayton. When deposed, Stockton denied that he had any conversation with Shupp regarding Mrs. Stayton's report.

Notwithstanding Stockton's failure to recollect any meeting with Shupp, William ("Willie") Shupp, Shupp's former husband, recalls noticing, in or about the Fall of 1998, that Shupp was upset and asked her what was wrong. Shupp told him that Stockton and Gale Drummond called her into a meeting to discuss rumors they had heard about her and Haley having an inappropriate relationship. Shupp told her husband that she denied having an inappropriate relationship with Haley, and that she asked Stockton and Ms. Drummond what the rumors were, specifically, in response to which, they told her that she and Haley had been seen kissing, hanging out, and spending a lot of time together. Stockton told Shupp *I don't believe it, but watch it.*

Further, despite Mrs. Stayton's report fitting within the no tolerance parameters of CISD, Stockton made no further inquiry with Mrs. Stayton regarding her report of Shupp and Haley's affair, nor did he speak to Mrs. Stayton's son or her son's girlfriend regarding the same.

Despite Ms. Stayton's report and the meeting between Stockton, Gale Drummond, and Shupp, which may or may not have occurred, the sexual contact between Haley and Shupp continued. At the age of 15, Haley was penetrated by Shupp, and eventually, the sexual activity arose to the level of oral sex. This type of activity continued into 1999.

During the Winter of 1999, Shupp's mother, who was also a CISD teacher, walked in on Shupp molesting Haley. At no time, however, did Shupp's mother ever come forward to report the same. Shupp's sexual abuse of King occurred on an every-other-day basis over the course of the next two and a half years, until December of 2001.

In the Fall of 1999, Haley was in the 10th grade at The Woodlands High School, where she continued to play volleyball, and Shupp remained a teacher and coach at McCullough Junior High. Shupp continued to act as assistant coach for the Woodlands High School varsity volleyball team. During the spring of that school year, Teresa Hinojosa ("Hinojosa"), the girls' varsity volleyball coach at The Woodlands High School, began looking for a replacement coach for the girls' junior varsity volleyball team. She contacted Shupp about the position, and Shupp indicated that she was interested. Hinojosa went to Weldon Willig ("Willig"), the athletic director for The Woodlands High School, and told him of her desire to hire Shupp as the new girls' junior varsity volleyball coach. Willig was supportive of her recommendation and very positive about and in favor of hiring Shupp, and while he indicated that he did not see Shupp's hiring as a problem, she would have to formally interview with

him and Karen Heintz ("Heintz"), the women's athletic director.

Stockton, now the principal at The Woodlands High School, would be involved in the interview and/or the hiring process, as Stockton had final approval of all hires at The Woodlands High School. Hinojosa also went to Karen Heintz and conveyed her recommendation of Shupp for the junior varsity job. Heintz indicated that the junior varsity job would be a move up for Shupp, implying that the job was Shupp's. After Shupp's interview with Willig and Heintz, Shupp told Hinojosa the interview went *great,* and that she felt as if she was going to get the job.

About two days after the interview, Hinojosa received a phone call from Weldon Willig, instructing her to come to his office. When she met with him, he indicated to her that Shupp would not be hired as the girls' junior varsity volleyball coach. He stated to her, *you are not going to get her, she will not be hired here, you need to look for another person.* When Hinojosa asked why, he threw up his hands as if to say don't ask me any questions. Willig then indicated that Hinojosa needed to speak with Karen Heintz about the matter

When Hinojosa asked Karen Heintz why she could not have Shupp as her junior varsity coach, Heintz replied, *this is not going to happen, you will likely not have her as your freshman coach either, and she will probably be put down coaching at the junior high level next year.* While neither Willig, nor Heintz explained why Shupp would not be hired, it was evident to Hinojosa that something happened after Shupp's initial interview, perhaps when Stockton got involved

in the matter. When Hinojosa told Shupp she did not get the job, she had very little, if any, response to the news. Shortly, thereafter, Willie noticed Shupp was upset, and when he asked her why, she told him that the rumors about her relationship with Haley had come up again, that it was one of the main reasons that she did not get the coaching position at the school, and that Heintz and Willig did not think it would be a good idea for her and Haley to be on the same campus.

Moreover, right after Shupp was turned down for the coaching job, Shupp interviewed with Stockton for a position teaching English at The Woodlands High School, and like with the coaching job, she was turned down for that position.

On or about January 24, 2002, Shupp was brought in for questioning by the authorities, at which time she admitted to her inappropriate relationship with King. Shupp was indicted on February 8, 2002 , and on July 30, 2002, she plead guilty to the charge of sexual assault of a child. Shupp is now a registered sex offender.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit erroneously interpreted a rule established by this Court in affirming a United States District Court judgment that essentially eliminates a school officials' duty to protect school children under their supervision from sexual abuse by their teachers, and which requires an abused student to proffer enough evidence during the pretrial stages of litigation against the school district and the school official who failed to protect the student, to win on summary

judgment versus requiring them only to show the existence of a fact issue.

Further, rather than addressing the portion of the district court's opinions, which relate to the notice prong of the *Gebser* standard set forth by this Court, the Fifth Circuit glossed over the same, thereby allowing the district court's erroneous ruling to stand as precedent in this jurisdiction.

The Fifth Circuit's interpretation is contrary to the decisions of this Court. The Court should grant certiorari to address the erroneous interpretation relied upon by the Fifth Circuit in affirming the United States District Court for the Southern District of Texas' judgment in this case, and to address the Fifth Circuit's failure to address the portions of the district court's opinions which relate to the notice prong of the *Gebser* standard.

I. THE FIFTH CIRCUIT'S OPINION IN THIS CASE, EFFECTIVELY ELIMINATES THE VALUE OF THE STANDARD THAT THIS COURT SET FORTH IN *GEBSER V. LAGO VISTA INDEPENDENT SCHOOL DISTRICT*, WHICH STANDARD WAS INTENDED TO ALLOW SCHOOL CHILDREN WHO ARE MOLESTED BY A TEACHER TO RECOVER CIVILLY AGAINST THAT TEACHER'S EMPLOYING SCHOOL DISTRICT.

A. CONTROLLING LAW

The Petitioner's claim against CISD arises under a federal law known as Title IX, which prohibits

discrimination on the basis of sex, which encompasses a teacher's sexual harassment of a student. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 282 (1998). In *Gebser*, which case involved the harassment of a student by a teacher, this Court established that a school district can be held liable in damages for one of its teacher's sexual harassment of one of its students if it is proven that the school district had actual notice of and exhibited deliberate indifference to the alleged harassment. *Id.* at 292. (Emphasis added).

1. *Actual Notice*

In addressing what could be considered as actual notice, this Court in *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), in which case parents brought action against a school district on behalf of their daughter, a student, alleging that she was sexually abused by a teacher, looked at the issue in the Title VII context. In that context, this Court recognized that it had previously explained that an employer has actual notice of harassment when an employee complains to higher management. *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989). This Court, in *Canutillo,* went on to say that other circuits have adopted a similar definition for Title VII actual notice. *Canutillo*, 101 F.3d at 401 (noting *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) ("The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management....")). This Court also stated, in *Canutillo,* that there is no reason to define actual notice differently in the Title IX context. *Canutillo*, 101 F.3d at 401. This Court went on to say,

that, in fact, one Title VII case cited by Leija to support her "appropriate employee" contention described the personnel that the plaintiff notified as "supervisory". *Canutillo*, 101 F.3d at 401 (citing *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 380 (W.D.N.C. 1988)). Therefore, before the school district can be held liable under Title IX for a teacher's hostile environment sexual abuse, someone in a management-level/supervisory position must be advised about (put on notice of) that conduct, and that person must fail to take remedial action. *Canutillo*, 101 F.3d at 401. While this Court did not answer the question of what would constitute the lowest level personnel to be notified in a Title IX case, it did indicate that the question is strongly linked to the facts and circumstances of a particular case. *Canutillo*, 101 F.3d at 401.

2. *Deliberate Indifference*

Gebser explained that a school district's deliberate indifference is established where a school official or other person with authority to take corrective action, has actual knowledge of [the abuse] and fails to adequately respond. *Id.* at 292. The deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 645 (1999). In describing the proof necessary to satisfy the standard, this Court stated that a plaintiff may demonstrate deliberate indifference where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances. *Id.* at 648. While no one particular response is required, in the *Williams v. Paint Valley Local Sch. Dist.*, 400 F.3d 360 (6th Cir. 2005), the

Court indicated that a school district's duty to respond may be sparked once it is alerted to the possibility of a sexual abuse. *Williams v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 364 (6th Cir. 2005). Further, the standard by which its response will be reviewed appears to escalate with the degree of its knowledge. In this regard, the *Williams'* Court indicated that, where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Finally, the *Williams'* Court indicated that, where a school district has actual knowledge that its efforts to remediate are ineffective, and continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances. It also appears equally true that a recipient [school district] would be precluded from avoiding notice. In *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), the Supreme Court addressed the issue of whether a recipient [of federal funding] could avoid notice of abuse, and noted that,

> If recipients were able to avoid such notice by retaliating against all those who dare complain, the statute's enforcement scheme would be subverted. We should not assume that Congress left such a gap in its scheme.

Id. at 1508. As it relates to the issue of notice or deliberate indifference in this case, a conscious failure to obtain or investigate obvious information effectively raises fact issues regarding knowledge and a school district's deliberate indifference.

B. Don Stockton, a Supervisory Official, Had Actual Notice That Felicia Shupp Was Sexually Molesting Haley King, And, Therefore, CISD Can Be Held Liable Based on His Actions Taken in Response to Such Notice.

Stockton first learned that Shupp might have been acting inappropriately with her students when D. Jane Allen spoke with Shupp about getting too familiar with her students and the need to act appropriately around them. In the Fall of 1998, Ruth Stayton, a mother of a student at McCullough, told Stockton that she overheard her son and his girlfriend speaking about his girlfriend's eyewitness account of one of the girls' volleyball coaches at the school kissing and passing notes with a female student and having an inappropriate affair with the female student. Stockton replied that he was aware of the coach, "Shupp", but indicated that he did not believe the information was true and that he knew Shupp's family. Notwithstanding Stockton's failure to recollect any meeting that took place with Shupp, and conflicting testimony from Shupp as to whether or not any such meeting took place, William ("Willie") Shupp, Shupp's former husband, recalls noticing, in or about the Fall of 1998, that Felicia was upset and asked her what was wrong. Shupp told him that, Stockton and Gale Drummond, an assistant principal at McCullough Junior High School, called her into a meeting to discuss rumors they had heard about Shupp and King having an inappropriate relationship. Shupp stated that she denied having an inappropriate relationship with King, and Stockton responded "I don't believe it, but watch it." Stockton admitted that, although the

school had a no tolerance policy against sexual abuse of students by employees, and that he was aware of school guidelines in place at the time that he received Mrs. Stayton's report regarding Shupp, his personal policy is to not give credence to or investigate any unsubstantiated information regarding the sexual abuse of a child by a school employee. Soon after Gail Drummond and Stockton's alleged meeting with Shupp, Gail Drummond's demeanor toward Haley noticeably improved, as she went out of her way to be kind to her, as where previously, she had been less friendly to Haley.

Stockton's knowledge of Shupp's sexual abuse of Haley was again evident a year and a half later, in the Spring of 2000, when he, ostensibly, became involved in the hiring process for a The Woodland's High School's new junior varsity volleyball coach. By his own admission, Stockton was involved in all the hires and fires at the schools at which he was the principal, which at the beginning of Shupp's abuse of Haley was McCullough Junior High and which later became The Woodlands High School. In the case of the hiring of a new coach, he stated that, in his school, a candidate would first be interviewed by the head coach of the sport for which a coach was being hired and the athletic director, and then have a separate, personal interview with him. That Spring, Hinojosa, the girls' varsity volleyball coach at the time, recommended Shupp for the junior varsity volleyball coaching position to Willig and Hientz, the men and women's athletic directors at The Woodland's High School, each of whom gave glowing reports of Shupp and thought highly of her. In addition, Shupp's record was pristine, providing no reason Shupp should be turned down for

the job. After Shupp interviewed with Willig and Heintz, everyone had the impression that the job was all but Shupp's. However, after Shupp's interview with Stockton, who reportedly told her that rumors about her and Haley having a sexual relationship, continued to circulate, Willig and Heintz told Hinojosa, in a "don't ask, don't tell fashion," that in no circumstance would Shupp be hired as her junior varsity volleyball coach, and, in fact, Shupp would most likely be sent to teach/coach at the junior high level the following year.

Telling is the change in the demeanor of Heintz toward Haley after her involvement in the interview process with Shupp and Stockton. Like Drummond, who sat in on the previous meeting with Shupp and Stockton, Heintz became noticeably friendlier and kind to Haley, whereas before, she had not been quite as nice to Haley, and that when asked why she had been speaking to Haley, Heintz replied, she *felt sorry for the kid*.

Very soon thereafter, Shupp interviewed with Stockton for an English teaching position that was available at The Woodlands High School, and, again, Stockton turned her down.

The undisputed facts are that Jane Allen saw Shupp getting inappropriately close with students; Shupp did not get the job that was certain to be hers after Stockton got involved in the hiring process; Mrs. Stayton reported her son's girlfriend's eyewitness account to Stockton, and in response, Stockton did nothing more than allegedly ask Shupp if she was having an inappropriate relationship with a student. It is evident from the evidence set forth in the record

that Stockton had notice of Shupp's sexual abuse of Haley. At the very least, the Petitioner had sufficient evidence to get past summary judgment and before a jury on such issue, leaving the only question for the district court to address prior to ruling on the motions for summary judgment filed by Stockton and CISD, as whether Haley could show a fact issue existed with regard to whether Stockton's response to the actual notice he received constituted deliberate indifference, and the known facts and circumstances indicate the answer to such inquiry is yes.[1]

Further, as the courts have repeatedly stated, avoiding obtaining knowledge is no defense in these type of cases. Regardless of whether Don Stockton knew the identity of the victim at the beginning of his investigation or not, it did not mean that the sexual abuse ceased or was not occurring, it simply meant that he had not stopped it or fully discovered the matter. What is certain, is that under all the prominent case law on this issue, Stockton had knowledge of the sexual abuse of a student, and arguably that the student was Haley King, which knowledge was adequate under the law and under the policies of the CISD to trigger an investigation. The real import of the analysis of the knowledge requirement in this type of case is not in deciding whether the information one has is complete or perfect, because surely in all instances it is not, but

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[1] The facts asserted herein are supported by the affidavits and deposition testimony proffered by the Petitioner, which included testimony that, in many of these instances, the Petitioner's name and/or identity was referenced by CISD personnel.

rather it goes to evaluating whether the actions, in this instance, of Don Stockton individually and as it binds CISD, upon receiving the information that he did were clearly unreasonable under the known facts and circumstances. In this case, there is at least a fact issue that Stockton's actions, in light of the information he had received with regard to Shupp's relationship with Haley, were clearly unreasonable.

Regardless, the district court ruled, as a matter of law, that Stockton did not have the requisite level of notice required to meet the notice standard set forth by this Court in *Gebser*, to hold a school district liable for a student's abuse by one of his or her teachers under Title IX, nor did it have enough evidence to even raise a question of fact with regard to the same, which ruling the Fifth Circuit glossed over in issuing its May 29, 2006 opinion, thereby leaving the district court's erroneous ruling as precedent to be followed in future cases, with similar facts. If this Court does not grant this petition for certiorari, and/or the district court's ruling, and the Fifth Circuit's affirmation of the same, are upheld, the notice requirement set forth in *Gebser*, is unobtainable, because, if the information provided to Stockton with regard to Shupp's abuse of Haley is not sufficient to meet such standard, and does not even raise a question of fact with regard to such issue sufficient to get a molested student past a summary judgment, the notice requirement in *Gebser* can only be satisfied, if a principal, or other supervisory official, as the case may be, witnesses the abuse, first hand, and admits that he or she witnessed the same, which would likely never occur, and *Gebser* does not require the same. Should this Court allow the rulings of the lower courts in this case to stand, the notice prong of

the *Gebser* standard, will have been altered in such a way that only a supervisory official's personal knowledge will satisfy the notice requirement, as a matter of law.

Therefore, this Court should grant this petition for writ of certiorari to eliminate the damaging precedent created by the opinions of the lower courts in this case.

C. Don Stockton Was Deliberately Indifferent to Felicia Shupp's Abuse of Haley King.

In responding to the complaint brought to him by Ruth Stayton in the Fall of 1998, and despite (1) CISD procedures that were in place at the time, which proscribed an investigation into all matters involving sexual abuse of students by school employees or any suspicion of the same, (2) the fact that such action was in contrast to his own previous practices, and (3) the fact that there were so many other obviously more effective actions he could have taken, at most, Stockton pulled Shupp in to his office to ask her about the matter, and when she said she was not acting inappropriately with students, he ended his investigation. Stockton did not speak to Mrs. Stayton's son, his girlfriend, who witnessed the inappropriate touching, or even interview other students on the volleyball teams. While Stockton asserts that he could not properly investigate an unsubstantiated rumor, it is a fact that when this matter was finally reported to the police in the beginning of 2002, they managed to get statements from eight separate people with knowledge of relevant facts, which included students, students' parents, the Petitioner, and CISD

administrators, as well as a full confession from Shupp in a matter of days. It is equally true that he, by policy and the law, did not have the luxury of not doing more, as he had already begun an investigation, in contrast to the analysis in *Doe v. Taylor*, 15 F.3d 443 (5th Cir. 1994), where reports were essentially ignored by the principal.

Relying on the following quote from *Taylor*, in his MSJ, Stockton stated that under *Taylor* his action of meeting with and warning Shupp shows that he was not indifferent to Plaintiff's constitutional rights,

> We can foresee many good faith but ineffective responses that might satisfy a school official's obligation in these situations, *e.g.*, warning the state actor, notifying the student's parents, or removing the student from the teacher's class. Indeed, if Lankford had sternly warned Stroud early on to stay away from Doe or risk termination and Lankford *then received no later indication of further misconduct*, the standard of deliberate indifference would be difficult to establish.

Id., 15 F.3d at 457, n. 12 (emphasis added), the Court. However, the Court in *Taylor*, found that Doe showed sufficient evidence to create a genuine issue of material fact to overcome a summary judgment filed by Lankford, Doe's principal at the time of her abuse, and like Lankford, Stockton did essentially nothing to prevent Shupp's abuse of Haley. Stockton, like Lankford, disregarded the reports he heard regarding Shupp's inappropriate relationship with Haley, and assumed they were untrue. With regard to Caplinger,

the superintendent sued by Doe in *Doe v. Taylor*, while Caplinger's summary judgment was upheld, Caplinger took action each when he received a report of Doe's relationship with a teacher. He called Doe's parents, he met and questioned Doe about the abuse, he met and questioned Stroud, the perpetrating teacher, about the abuse, and he reprimanded Stroud and told him that if he did not stay away from Doe, there would be consequences. Therefore, Stockton's actions in response to Ms. Stayton's report, while very similar to Lankford's response to allegations of Doe's abuse in *Taylor*, were a far cry from those taken by Caplinger in *Taylor*.

After all, despite having information which would allow him to do so; *i.e.*, the identity of an eye witness's boyfriend and access to the names of girls playing volleyball, no evidence exists which suggests that Stockton attempted to determine Haley's identity, let alone take any action to protect her from Shupp, nor does any evidence suggest that Stockton threatened to terminate Shupp. Moreover, even assuming Stockton and Gail Drummond called Shupp into Stockton's office, regarding which there is conflicting testimony, met with her there, and asked her whether or not she was having an inappropriate relationship with a student, Stockton knew that his speaking to Shupp had been ineffective, and that Shupp's relationship with Haley continued; he certainly received indications that such was the case, because a year and a half later, in the Spring of 2000, when Stockton interviewed Shupp for the junior varsity coaching position, he told Shupp that rumors were still circulating about her relationship with Haley, and indicated to Shupp that he had been aware of those rumors for a year and a

half. Knowing the "rumors" had gone on for so long, a reasonable principal would have taken additional, more effective action to stop the abuse.

Stockton's actions give no indication that he was concerned with keeping Shupp from abusing Haley or anyone else for that matter. In fact, soon after Shupp was denied the teaching and coaching positions at The Woodlands High School, she left her job at McCullough, and applied for a job at Branch Crossing, another junior high school in CISD, and Stockton did nothing to stand in Shupp's way of obtaining such job. Shupp's leaving McCullough presented CISD with the perfect opportunity to get her out of the school district and away from its students, but instead, Shupp was rehired to teach 7th Grade English to children who were similar in age to Haley when Shupp first started abusing her. Stockton failed to take obvious and necessary actions given certain known information on several occasions which would have stopped the abuse, thereby demonstrating conscious indifference to Haley's constitutional rights.

Admittedly, there is conflicting evidence as to whether Stockton did or did not meet with Shupp after receiving Mrs. Stayton's report, and if he did, as to whether or not he knew Haley's identity at the time of the meeting. Regardless, Don Stockton's sole act of speaking to the perpetrator of the sexual abuse, upon receiving Mrs. Stayton's report, was clearly unreasonable under the known facts and circumstances, or, at the very least the facts and circumstances of this case create a questions of fact with regard to such determination.

The Fifth Circuit's application of an erroneous interpretation of *Gebser* in affirming the district court's opinion in this case, which error serves to render the "deliberate indifference" standard set forth in *Gebser*, meaningless. In the very same paragraph of the Fifth Circuit's May 29, 2007 per curium opinion wherein the Fifth Circuit characterized Stockton's actions (or lack thereof) with regard to Shupp's abuse of Haley, as "ineffective, and perhaps negligent," it was stated that the facts of this case did not create a genuine issue of material fact as to whether or not Stockton acted deliberately indifferent.

If this Court does not grant this petition for certiorari, and/or the Fifth Circuit's affirmation of the district court's ruling in this case is upheld, the deliberate indifference standard set forth in *Gebser*, will have been rendered useless, because Plaintiffs will not be able to overcome a summary judgment filed by a school district without proving, as a matter of law, that (1) a principal witnessed their abuse, first hand, and is willing to admit they witnessed such abuse, on the record, and that (2) they did absolutely nothing about the abuse they saw. If this Court allows the rules of law that it set forth in *Gebser* to be interpreted in such a way that students molested by their teachers cannot recover, unless the student's principal admits having witnessed the abuse and doing nothing about it, then *Gebser* offers students no protection from child molesting educators.

Therefore, this Court should grant this petition for writ of certiorari, clarify its intentions for the interpretation of the law established by *Gebser*, remand this case to the Fifth Circuit to reverse its

opinion, and to allow the Petitioner a trial on the merits of her case.

II. THE FIFTH CIRCUIT'S ERRONEOUSLY AFFIRMED THE DISTRICT COURT'S OPINION IN THIS CASE, THEREBY CREATING LAW FOR PRINCIPALS TO HIDE BEHIND WHEN DECIDING TO TURN A BLIND EYE TO AN EYE WITNESS ACCOUNT, BROUGHT TO THEIR ATTENTION, OF A TEACHER MOLESTING A STUDENT, ON THEIR CAMPUS.

A. CONTROLLING LAW

Under § 1983, a plaintiff must allege two elements: (1) that the plaintiff was deprived of a right or interest secured by the Constitution and laws of the United States; and (2) that the deprivation occurred under color of state law. *See West v. Atkins,* 487 U.S. 42, 48 (1988). A public official is entitled to qualified immunity from a § 1983 claim if the plaintiff has not stated a violation of a clearly established constitutional right. *See Seigert v. Gilley,* 500 U.S. 226, 231-32 (1991); *Jones v. Collins,* 132 F.3d 1048, 1052 (5th Cir. 1998).[T]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the Fourteenth Amendment guarantee of due process. *See Doe v. Taylor,* 15 F.3d 443, 450-51 (5th Cir.) (en banc), *cert. denied sub. nom, Lankford v. Doe,* 513 U.S. 815 (1994); *Shillingford v. Holmes,* 634 F.2d 263, 265 (5th Cir. 1981). It is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by

the Fourteenth Amendment. *See Taylor,* 15 F.3d at 451-452.

Although the law is clear that physical sexual abuse of a student by a school teacher can give rise to § 1983 liability, a separate and essential element of such a claim is that the abuse occur under color of state law. *See Becerra v. Asher,* 105 F.3d 1042, 1045 (5th Cir.), *cert. denied,* 522 U.S. 824 (1997). If a 'real nexus' exists between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher, then the teacher's conduct is taken under color of state law. *See Taylor,* 15 F.3d at 452 n.4; *Becerra,* 105 F.3d at 1046. This Court has also held, however, that, given a real nexus, school supervisors who are deliberately indifferent to a student's constitutional liberty interest in her bodily integrity may themselves be the state actors who perpetrated the constitutional tort, regardless of whether the individual who actually made illicit physical contact with the student was acting under color of state law. *See Becerra*, 105 F.3d at 1048 (per curiam).

> A supervisory school official can be held personally liable for a subordinate's violation of an elementary or secondary school student's constitutional right to bodily integrity in physical sexual abuse cases if the plaintiff establishes that: (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and (2) the defendant demonstrated deliberate indifference

> toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and (3) such failure caused a constitutional injury to the student.

Taylor, 15 F.3d at 454.

1. *Haley Suffered a Constitutional Violation under Color of State Law*

The facts, as outlined above clearly show that Shupp violated Haley's Fourteenth Amendment right to bodily integrity by sexually abusing her. After all, based on such violations, Shupp sexually molested Haley from the Fall of 1998 until December of 2001, and due to such molestation, Shupp is now a registered sex offender. The district court determined that a genuine issue of materia fact, sufficient to overcome a summary judgment motion by either Stockton or CISD, as to whether Shupp's molestation of Haley such was committed under Color of State Law. Accordingly, this Petition for Writ of Certiorari will not address that issue herein will move on to address Stockton's knowledge of Shupp's abuse of Haley, and deliberate indifference in responding to the same.

2. *Don Stockton Can Be Held Liable for Felicia Shupp's Violations of Haley King's Constitutional Rights*

The controlling case in this area is *Doe v. Taylor,* 15 F.3d 443, 450-51 (5th Cir.) (en banc), *cert. denied sub. nom, Lankford v. Doe,* 513 U.S. 815 (1994), wherein

the Fifth Circuit set forth the rule that, for an administrator to be held personally liable under § 1983 for a subordinate's violation of a student's constitutional right to bodily integrity, he must have had knowledge of the abuse, demonstrated conscious indifference toward the Constitutional rights of the student by failing to take action that was obviously necessary to stop the abuse, and such failure caused a constitutional injury to the Plaintiff. *See id.*, 15 F.3d at 454.

In *Taylor*, a student (Doe) was sexually abused by her high school teacher (Stroud). *Id.*, 15 F.3d at 445. The student sued the school principal (Lankford) and the school district superintendent (Caplinger) in their supervisory capacity for permitting violations of her right to bodily integrity. *Id.* The district court denied the defendants' motions for summary judgment, and the Court of Appeals reversed the District Court's denial of summary judgment, and thus qualified immunity, as to the superintendent, but affirmed the District Court's denial of summary judgment as to the principal. *Id.* The Court determined the principal's § 1983 liability and the superintendent's lack of § 1983 liability based on the variance in their knowledge of Stroud's sexual abuse of Doe and their reactions to information that formed the basis of that knowledge. *Id.*[2]

When compared to *Taylor*, the facts offered by the Appellant at the summary judgment stage evidenced

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[2] The Court in *Taylor* indicates that "[d]eliberate indifference will often be a fact-laden question." *Id.*, at 456 n.12.

that Stockton's knowledge and conscious indifference were far more similar to Lankford's, the principal, than to Caplinger's, the superintendent, or, at least, issues of material fact existed concerning such, which required the denial of his motion for summary judgment.

B. DON STOCKTON HAD THE REQUISITE KNOWLEDGE AND WAS DELIBERATELY INDIFFERENT TO SUCH NOTICE

The rendition of facts and the record supporting Haley King's contention that Don Stockton had notice of the abuse and was deliberately indifferent to it as set forth in Sections IB, IC and in parts of II of this Petition for Writ of Certiorari are incorporated herein for all purposes. Accordingly, the Petitioner's analysis of CISD's liability under Title IX, as it relates to the issue of Stockton's knowledge and deliberate indifference, is the same for the Petitioner's 42 U.S.C. § 1983 claim against Don Stockton, individually, and since such analysis is set forth above, the Petitioner feels as though it would be redundant to restate such analysis in this portion of her Petition for Writ of Certiorari.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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